Tan Ah Tong v Perwira Habib Bank (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-65 OF 1996
NH CHAN, MOKHTAR SIDIN AND HAIDAR JJCA
8 JULY 1998

Contract *— Guarantee — Discharge — Letter confirmed by senior general manager that guarantor was discharged — Whether senior general manager had authority to discharge — Whether guarantor knew who had authority to discharge — Indoor management rule — Whether discharge of guarantee must be under seal or supported by consideration*

The appellant was a guarantor to the loan facilities granted by the respondent. The appellant relied on a letter addressed to the respondent whereby the respondent through its then senior general manager ('DW1') purportedly confirmed the appellant's application to be discharged as a guarantor. The respondent contended that: (i) DW1 had no authority to discharge the appellant as a guarantor because the authority was vested in a committee; and (ii) the discharge of a guarantee must be under seal or supported by consideration. The High Court gave judgment against the appellant. The appellant appealed.

Held, allowing the appeal:

(1) The appellant was entitled to rely on the authority of DW1 to discharge him as a guarantor as DW1 held a senior position in the respondent bank. In fact, he was a member of the committee that had the authority to discharge guarantors. Further, the appellant was not told that DW1 had no authority. The guarantee did not specify the authority or the manner the release or discharge is to be executed The question is — how was the appellant to know of this fact? In that event, he was entitled to invoke the rule in *Royal British Bank v Turquand*, ie the benefit of the indoor management rule (see pp 781I and 782A–B); *Royal British Bank v Turquand* (1856) 119 ER 886 followed.

(2) It is manifest that the discharge may even be oral or be effective as a waiver or as an estoppel. Therefore, the contention of the respondent that the discharge of a guarantee in order to be legally binding must be supported by consideration could not be accepted (see p 782I).

[Bahasa Malaysia summary

Pemohon adalah penggerenti kepada kemudahan pinjaman yang diberikan oleh penentang. Pemohon bergantung kepada surat yang dialamatkan kepada penentang di mana penentang melalui pengurus am kanan ketika itu ('DW1') mengesahkan permohonan pemohon untuk dilepaskan sebagai penggerenti. Penentang berhujah bahawa:

A (i) DW1 tidak mempunyai kuasa untuk melepaskan pemohon sebagai penggerenti kerana kuasa tersebut terletakhak pada sebuah jawatankuasa; dan (ii) pelepasan gerenti mesti dimeterai atau disokong dengan balasan. Mahkamah Tinggi memberi penghakiman terhadap pemohon. Pemohon merayu.

B **Diputuskan,** membenarkan rayuan:

(1) Pemohon berhak untuk bergantung kepada kuasa DW1 untuk melepaskannya sebagai penggerenti kerana DW1 memegang kedudukan yang tinggi di dalam bank penentang. Pada hakikatnya, dia adalah seorang ahli jawatankuasa yang mempunyai kuasa C untuk melepaskan penggerenti. Gerenti tidak menyatakan kuasa atau cara pembebasan atau pelepasan patut dilaksanakan. Soalannya adalah — bagaimanakah pemohon akan tahu tentang fakta ini? Dalam keadaan itu, dia berhak untuk menggunakan peraturan di dalam *Royal British Bank v Turqand*, iaitu manfaat D peraturan pengurusan dalaman (lihat ms 781I dan 782A–B); *Royal British Bank v Turqand* (1856) 119 ER 886 (1856) diikut.

(2) Adalah jelas bahawa pelepasan boleh diberikan secara lisan atau berkesan sebagai satu penepian atau sebagai satu estopel. Oleh itu, hujah penentang bahawa pelepasan gerenti untuk menjadi terikat di sisi undang-undang mesti disokong dengan balasan E tidak boleh diterima (lihat ms 782I).]

Notes

For cases on discharge of guarantor, see 3 *Mallal's Digest* (4th Ed, F 1997 Reissue) paras 2306–2310.

Cases referred to

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)

G *Royal British Bank v Turquand* (1856) 119 ER 886 (flld)

Appeal from: Suit No C3–23–4213–86 (High Court, Kuala Lumpur)

Malik Amtiaz Sarwar (*Vazeer Akhbar Majid & Co*) for the appellant.

H *Vinaga Raj* (*Skrine & Co*) for the respondent.

Cur Adv Vult

Haidar JCA (delivering the judgment of the court): This appeal is confined I to only one issue. The issue is whether the appellant (the second defendant) has been discharged as a guarantor by the respondent bank.

The appellant relied on a letter dated 31 January 1985 (exh D3) addressed to the respondent bank by the appellant whereby the respondent

bank through its then senior general manager/secretary, Mazlan bin Khamis (DW1) purportedly confirmed the appellant's application to be discharged as a guarantor to the bridging loan and overdraft facilities ('the loan facilities') given to Asialand Housing Development Sdn Bhd ('the first defendant') by the respondent bank.

The facts

The respondent bank provided the loan facilities to the first defendant and as at 30 June 1986 a sum of RM3,448,111.44 together with interests as set out therein was due and payable (p 17 of the record). The appellant together with the third, fourth and fifth defendants stood as guarantors. All of them were directors of the first defendant.

Judgment in default of appearance was entered against the first defendant on 12 February 1987 and the claim against the third and fourth defendants as guarantors was withdrawn by the respondent bank. In respect of the fifth defendant, a consent judgment was entered against him. The present appeal involved the appellant only wherein judgment was entered against him after a full hearing.

The appellant was a guarantor to the loan facilities and he executed the guarantees (pp 63, 69 and 81 of the record) in favour of the respondent bank in addition to the security by way of lands charged to the respondent bank. It seemed that at the date of the hearing of this suit, the charge action was still pending as the appellant was resisting it at all stages (see p 16 of the record).

The issue

As intimated earlier on, the issue is centred on the letter dated 31 January 1985 (exh D3) whereby the appellant contended that the respondent bank through its then senior general manager/secretary, Mazlan bin Khamis (DW1) had discharged the appellant as a guarantor. Though it is not disputed that DW1 did endorse 'I confirm the above' on exh D3, the respondent bank, however, contended that DW1 had no authority to discharge the appellant as a guarantor. Such authority, according to the respondent bank's witness, Tan Kwee Hee, its Deputy General Manager (PW1), is vested in a committee comprising of the executive director, the general manager and the company secretary of the respondent bank. It would therefore include DW1. According to PW1, he could not find exh D3 in the record of the respondent bank. PW1 was the deputy general manager of the respondent bank at the time when he gave evidence. He admitted that he was not personally in charge of the account in question in 1985.

As the defence of the appellant is centred on exh D3 it would be appropriate to set it out in full:

Tan Ah Tong
514-1A 3rd Mile

A

Jalan Ipoh
Kuala Lumpur.
31 January 1985

The General Manager
Perwira Habib Bank (M) Bhd
B Wisma SPK, Jalan Sultan Ismail
Kuala Lumpur.

BY HAND

Dear Sir,

Re: (1) Overdraft Facility and Fixed Loan of $300,999 each to Tan Realty
C Dev Sdn Bhd

(2) Loan and Overdraft Facility of $100,000 and $1.65M to Asialand Housing Dev Sdn Bhd

Further to my letter of yesterday to you. Kindly confirm the following which were agreed by you at our meeting at your office on 30 January 1985.

D (1) Perwira Habib Bank (M) Bhd has discharged Mdm Lim Weow @ Lim Neu and myself absolutely from all liabilities as guarantors for the above overdraft facility and loan to Tan Realty Development Sdn Bhd and in substitution thereof, Mr Lim Han Kiong and Mr Lim Kim Chin will be the new guarantors who will assume all the liabilities under the Guarantee and;

E (2) Perwira Habib Bank (M) Bhd has also discharged me absolutely from all liabilities as a guarantor of Asialand Housing Development Sdn Bhd in respect of the above loan and overdraft facility.

Thank you and best regards.

I confirm the above,

F

Yours faithfully,

Sgd	Sgd
.....	.....
Tan Ah Tong	Hj Mazlan bin Khamis

G It would appear from the opening paragraph of exh D3 that it was written by the appellant to confirm the meeting he had with the respondent bank on 30 January 1985, a day earlier. The appellant confirmed this in his evidence (see p 28 of the supplementary record). Paragraph 2 of exh D3 is relevant as it relates to the defence relied on by the appellant. It clearly
H states that the appellant was discharged absolutely from all liabilities as a guarantor of the first defendant in respect of the loan facilities referred to therein. Such discharge was accordingly confirmed by the endorsement thereon on exh D3 by DW1. In the circumstances, the appellant contended that he was accordingly discharged as a guarantor. Hence there should not be any claim against him as a guarantor by the respondent bank.

I The appellant, in our view, is entitled to rely on the authority of DW1 to discharge him as a guarantor as DW1 held a senior position in the respondent bank. DW1 was not just an ordinary clerk or an insignificant officer in the respondent bank. According to PW1, DW1 was one of the

attorneys appointed by the respondent bank. In fact if we follow the evidence of PW1, he was — by virtue of his post — a member of the committee that had the authority to discharge guarantors. According to the appellant, DW1 did not tell him that he had no authority to do so though at the hearing DW1 under cross-examination admitted that he had no authority and that such authority was vested in a committee. The question is — how was the appellant to know of this fact? In that event, he is entitled to invoke the rule in *Royal British Bank v Turquand* (1856) 119 ER 886 commonly referred to as the rule in *Turquand*'s case (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465).

It is, however, clear that the rule in *Turquand*'s case cannot be invoked by an outsider who knows or ought to know that there is an irregularity. In other words, such a person cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). In this case, cl 5 of the guarantee (p 70 of the record) provides for the release or discharge of any of the guarantors by the respondent bank. It reads:

> You shall be at liberty to release or discharge any of the guarantors from the obligations of this guarantee or to accept any composition from or make any other arrangements with any of the guarantors without thereby prejudicing or affecting your rights and remedies against the other or others of the guarantors.

In other words this clause gives the respondent bank the power to release or discharge any of the guarantors without specifying the authority or the manner the release or discharge is to be executed.

The respondent bank, however, contended that the discharge of a guarantee in order to be legally binding must be under seal or supported by consideration and cited *The Modern Contract of Guarantee* by Dr John Phillips (2nd Ed) at p 370 in support thereof. The short answer to that can be found in *The Modern Contract of Guarantee* (1992) by O'Donovan and Phillips at p 370 where it is stated:

> The creditor and the guarantor may expressly agree to discharge the guarantee. *On normal contractual principles,* this will operate as a rescission of the contract of guarantee provided that it is legally binding, being either under seal or supported by consideration and provided that the creditor's agreement has not been procured by fraud. *The agreement may be oral, even though the original guarantee is required to be in writing ... .*
>
> *If there is no consideration, however, the creditor's promise may still be effective as a waiver or as an estoppel.* (Emphasis added.)

It is manifest that the discharge may even be oral or be effective as a waiver or as an estoppel. Therefore the contention of the respondent bank that the discharge of a guarantee in order to be legally binding must be supported by consideration cannot, with respect, be accepted.

The learned judge erred in agreeing to the submission of the counsel for the respondent bank that the appellant could not rely on the rule in

A *Turquand*'s case or the concept of indoor management on the ground that DW1 told the appellant in the meeting held on 30 January 1985 that he had no authority to discharge the appellant (see p 8 of the supplementary record). There was no such evidence before him to warrant such a conclusion. There was on the contrary the testimony of the appellant under cross-examination that DW1 did not tell the appellant that his application would be referred to the committee for a decision. The appellant did not know that DW1 had no authority to release him as a guarantor. In fact the conduct of DW1 was consistent with one who had such authority. Further, by way of cl 5 of the guarantee, the power to release or discharge is vested in the respondent bank thereby resulting in the appellant writing exh D3 to the respondent bank to confirm the matters discussed and agreed upon, at the meeting with the respondent bank on 30 January 1985. One of the matters discussed must have been related to the discharge of the appellant as a guarantor. Consequently DW1 gave effect to the agreement by endorsing on exh D3 'I confirm the above'. If it is otherwise the respondent bank would have issued a letter to the appellant rejecting his application for a discharge as a guarantor.

The feeble attempt by the respondent bank by way of cross-examination of DW1 to show that DW1 had no authority and DW1 attempting to explain what he meant by the words 'I confirm the above' could not be accepted. Simply put, what he need to do is merely to acknowledge receipt of exh D3 and refer it to the committee with his recommendation. The endorsement of the words 'I confirm the above' in relation to the contents of para 2 of exh D3 clearly mean that the respondent bank through DW1 confirmed the agreement reached to discharge the appellant as a guarantor. For the record, the respondent bank did discharge the third and fourth defendants as guarantors by withdrawing the suit against them.

We accordingly allowed the appeal with costs here and below. We ordered that the suit against the appellant be dismissed. Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar